84-906

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

GARY CARSON PRO SE, PETITIONER

v.

WESTERN ELECTRIC CO., INC.
NOW DOING BUSINESS AS AMERICAN TELEPHONE
AND TELEGRAPH TECHNOLOGIES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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43PP

QUESTIONS PRESENTED

A Court of Appeals issued a judgement affirming an opinion and order of a District Court:

1. This is a mixed question of law and fact. Whether or not the Circuit Court of Appeals' opinion contains separately stated findings of fact and conclusions of law: (a)whether of not that court properly applied the law to whatever those facts were.

2. May a court of appeals properly invoke Rule 52(a), Federal Rules of Civil Procedure, U.S.C. 28, without separately stating its findings of fact and conclusions of law: (a)without finding every fact material to its conclusions, and, (b)did the District Court prejudice petitioner's right to a fair hearing on

appeal by not providing subsidiary findings of fact and its conclusions of law.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Sixth Circuit are listed in the Caption, to wit: 1) Petitioner Gary Carson is a Black male citizen of the United States and upon filing in the District Court was a resident of the City of Pataskala, County of Licking and State of Ohio; 2) Respondent Western Electric Company has been and is now a Corporation doing business in the City of Columbus, County of Franklin and State of Ohio.

CORPORATE PARTY'S AFFILIATIONS

Petitioner Gary Carson is a private United States Citizen with no corporate affiliations.

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OPINIONS BELOW

The opinions of the District Court and Circuit Court of Appeals are reprinted in the Appendix.

PETITION FOR CERTIORARI JURISDICTION

Gary Carson, your petitioner Pro Se, hereby draws near to the High Court and respectfully prays and cries that a Writ of Certiorari be issued to the United States Court of Appeals for the Sixth Circuit, formerly Case No. 32-3741 to review its final order issued as Mandate on August 22, 1984, (is appended hereto as petitioner's Exhibit "A"), affirming the District Court's opinion and order dismissing petitioner's Cause. The District Court's opinion was filed October 5, 1982 (Appendix "B"). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §2106, 62 United States Statutes at Large, 963, and 18 United States Statutes at Large, Chapter 77 at page 315.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The Constitutional Provisions involved are contained in the Fourteenth Amendment, shown below in pertinent part:

"AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The statute regulating the contents of the District Courts' judgment decrees when promulgated, and upon which the Circuit Court invoked, is Rule 52(a)

of the Federal Rule of Civil Procedure §28 U.S.C. in pertinent part:

> "Rule 52. Findings by the Court
>
> (a) Effect. In all actions tried upon the facts without a jury of with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein . . ."

The Statutes pertaining to this Court's Jurisdiction and ultimate determination are respectively 28 U.S.C. §2106, 62 Stat. 963,

"§2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

and:

The Public Acts of the Fourth Third Congress, 18 United States Statutes At Large (Chapter 77 at page 315, Volume 3 which is an act to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes, appears in pertinent part:

"Be it enacted by the Senate and House of Representatives of the United

States of America in Congress Assembled. That the circuit courts of the United States in deciding causes . . . upon which its renders it judgments or decress, and shall state the facts and conclusions of law separately . . . The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to the questions of law arising upon the record, and to such ruling of the circuit court expected to at the time, as may be presented by a bill of exceptions, prepared as in actions of law. Sec. 2. That this act shall take effect on the first day of May, eighteen hundred and seventy-five."

Approved February 16, 1875.

and:

The Federal Rules of Evidence:

"On November 20, 1972, the Supreme Court promulgated the Final Draft, as amended in 1972, as the Federal Rules of Evidence, with Mr. Justice Douglas dissenting.

The Court Ordered:

1. That the rules hereinafter set forth, to be known as the Federal Rules of Evidence, be, and they hereby are, prescribed pursuant to Sections 3402, 3771 and 3772, Title 18 United States Code, and Sections 2072 and 2075, Title 28 United States Code, to govern procedure, in the proceedings and to the extent set forth therein, in the United States courts of appeals, the United States district courts, the District Court for the District of the Canal Zone and the district courts of Guam and the Virgin Islands, and before the United States magistrates.

2. That the aforementioned Federal Rules of Evidence shall take effect on July 1, 1973, and shall be applicable to actions and proceedings brought thereafter and . . ."

Which further, and more specifically appear in pertinent part:

"Rule 102, Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

"Rule 103, Rulings on Evidence

(d) Plain Error - Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge."

and:

This case below involves The Civil Rights Act of 1964, Title 42 U.S.C. §2000(e) et seq. and §1981 which respectively appear in pertinent part:

§2000e-2. Discrimination because of race, color, religion, sex or national origin

(a) Employers. It shall be unlawful employment practice for an amployer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

"§1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory

to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

The jurisdiction of the Dictrict Court was invoked pursuant to the provisions of Title VII of the Act known as "The Civil Rights Act of 1964", Title 42, United States Code §2000(e), et. seq. and 42 U.S.C. §1981, this being a suit brought by a Black plaintiff who as been denied his civil rights through the unlawful employment practices of the defendant.

Respondent Western Electric Company, Inc., now doing business as American Telephone and Telegraph Technologies has been and is now a corporation doing business in the City of Columbus, County of Franklin and State of Ohio. Respondent has been and is now an employer within the meaning of

Title 42 U.S.C. §2000(e) (g) and (h).

Petitioner has complied with all conditions precedent to filing suit under Title 42, U.S.C. §2000(e). He filed a timely charge with the district director of the Equal Employment Opportunity Commission (hereinafter referred to as (E.E.O.C.). On September 20, 1977, petitioner received a notice under the provisions of Section 706(e) of Title VII that he had a right to bring a civil action in a United States District Court, which petitioner accomplished on December 15, 1977 in the United States District Court for the Southern District of Ohio.

Petitioner maintains that Respondent discriminated against him by: (1) failing to protect him adequately from racial harrassment by fellow

employees; (2) "disciplining" him in a disparate manner, and; (3) ultimately refusing to allow him to return to work from a sick leave, thus terminating his employment.

Petitioner's former union, The International Brotherhood of Electrical Workers, (hereinafter, I.B.E.W.) was also named defendant, and the Court granted defendant I.B.E.W.'s motion to dismiss the claims against it pursuant to Rule 40(B) of the Federal Rules of Civil Procedure.

Whereunto, petitioner suffering an aggravation of his pre-existing nervous condition, sought relief to include the sum of Two Million and 00/100 Dollars ($2,000,000.00) for the loss of employment; and punitive damages in the sum of Seven Hundred Fifty Thousand

and 00/100 Dollars ($750,000.00).

The case was tried to the Court, the Honorable Robert M. Duncan presiding, for nine (9) days, beginning March 1, 1982. On October 5, 1982, the Court ordered judgment in favor of Respondent regarding Petitioner's allegations with judgment in favor of Plaintiff on defendant's counter claim and dismissed petitioner's cause.

The record consisted of four volumes of pleadings, nine volumes of trial transcripts, three volumes of deposition, one volume of exhibits. The record included oral testimony which was heavily supported by documents which bear on the question for decision and testimony from witnesses not appearing in person. The clear and non-disputed facts include, but are not limited to:

1. Respondent Western Electric, prior to trial, believing Black petitioner to have been mentally incompetent with an infant-like mentality and not capable of handling his personal affairs and further thinking petitioner required the services of a guardian ad litem for his own protection filed with the District Court as docket entry Number 7, on February 8, 1979 a Motion Of Defendant For Appointment of A Guardian Ad Litem For Plaintiff And Associated Motions.

2. Respondent, in support of its motion presented, in camera, to the District Court, medical documentation, opinions, evaluations, and oral testimony from its medical director and likewise from its specially selected private practicing psychiatrist from the local community. The period of time

at issue therein covered all of the employment controversies and aspects complained of at trial: (a)respondent's failure to protect plaintiff adequately from racial harrassment from fellow employees; (b)respondent's "disciplining" plaintiff in a disparate manner; (c) respondent's refusal to allow plaintiff to return from a sick leave, thus terminating his employment.

3. Upon all of the issues adjudicated in the courts below, and arising out of his employment, petitioner, who being a member of a class entitled to the protection of Title VII, had established that he was accorded treatment different from that accorded persons otherwise similarly situated who were not a member of his class, had established a prima facia case raising the presump-

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tion of intentional discrimination by respondent.

4. Respondent's medical director, whose psychiatric testimony weighed heavily upon the District Court for decision was not a psychiatrist and woefully incompetent on the record to testify as a medical witness, by schooling, training and experience.

5. Respondent's sole reason for terminating Black petitioner's fourteen-year livelihood, a substantial constitutionally protected property right, was because he failed to provide respondent's medical director with a written release to allow him to gain legal access to all of his medical records.

6. Respondent had a nineteen-year uniform past practice of allowing similarly situated white employees to return to work.

7. The District Court's opinion is void of any reference to the above respondent's characterization, belief and material representation that Black petitioner was mentally incompetent therein.

8. Although petitioner perfected a timely appeal of the District Court's adverse decision, he was denied his opportunity to oral argument by the Circuit Court via a letter from the Clerk filed February 29, 1984 which appears in pertinent part:

> "The Court is expecting that this case will be submitted on briefs without oral argument. If either party has additional arguments they would like to present to the court prior to submission, those arguments should be submitted in writing not later than March 21, 1984.

You will be promptly advised when the court reaches its decision in the case."

9. During the proceedings before the Circuit Court of Appeals, the material issue "That there were no findings of facts and conclusions of law in the District Court's opinion and order" was raised by petitioner's reply brief which asked the Circuit Court to so find.

10. Petitioner raised many exceptions to the Circuit Court; (1) factual acts of statutory irregularities inflicted by respondent upon petitioner which were material to the conclusion of the trial and which appears on the record to which the District Court failed or refused to include in its written opinion.

11. The Circuit Court of Appeals opinion neither gives a definitive answer

to the issues raised on appeal nor finds one way or another, and is void of any supportive precedents or case law which constitute the grounds of its action.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW CONTRAVINES ACT OF CONGRESS, 18 ST. 315 AND DISDAINS THE LONG STANDING ACCEPTED USUAL COURSE OF JUDICIAL PROCEEDINGS AS HELD BY THIS COURT IN THE E.A. PACKER SCULLY V. NEW JERSEY LITERAGE CO., (1891).

The decision below, being void of Circiut Courts findings of fact and conclusions of law breaches and impinges upon the long standing, accepted and usual course for judicial proceedings born in Chapter 77, Public Acts of the Fourty Third Congress (1875) 18 United States Statutes at Large entitled "an act to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes", requiring the circuit courts to find the facts and conclusions of law upon which it renders its judgments or decrees, and which was affirmed by this court in The

E.A. Packer Scully v. New Jersey Literage Co., (1981) 140 U.S. 360, 11 S. Ct. 794. Although this was an admiralty and maritime decision the Packer Court decided:

> "There is no practice under this statute which is peculiar to Courts of Admiralty. The rule is general that wherever the trial court finds the facts and conclusions of law therefrom it is bound to find every fact material to its conclusions, and a refusal to do so is a ground for reversal."

B. THE DECISION BELOW SHOWS RECKLESS DISREGARD

The overall undisputed facts on the record; respondent's manifest intentions toward petitioner and the negative rulings by the Courts below without subsidiary findings of facts and conclusions of law constitute a clear

state of plain and obvious error which affect the substantial constitutional rights of petitioner and if uncorrected, will be an affront to the integrity and reputation of these judicial proceedings.

As in civil litigation of this nature, the intent or state of mind of the respondent herein weighs heavily here and cannot be ignored; see 29 Am. Jur. 2d §365. p.414, in pertinent part below:

> "When one's motive, intention, malice or ill will good or bad faith, or other state of mind in doing or omitting to do certain acts becomes an issue in a civil action, his acts, statements and conduct on other occasions which have a bearing upon his state of mind upon the occasion in question are relevant and competent evidence. However, to be admissible, such col-

> lateral matters must be shown to be so connected with the matter in litigation as to make it apparent that the party to be charged had a common purpose in both. Moreover, such collateral proof must be limited to a certain period of time so that it may naturally throw light upon the state of mind of the actor in question . . ."

Where, as here, respondents being convinced that Black petitioner was mentally incompetent unto not being able to properly handle his personal affiars and insisting thus upon the District Court, assisted by independent psychiatric oral testimony and further supportive written attestations for a period of time covering all of the issues at trial; and with the opinions of the Courts below being void of findings of facts to the contrary; petitioner submits that it is factually and legally

impossible for respondent to be free from its prima facia implications herein; and free from evil intent under Title VII and Section 1981 to discipline, or terminate petitioner for failing to sign a written legal release, releasing all of his medical records.

If not for malice, how can an employee reasonably be held liable to punishment under respondent's bona fide disciplinary procedures when respondent thought him to be mentally incompetent at that time. How can petitioner reasonably be held liable for not signing a legal release when respondent thought that he had an infant-like mentality that caused respondent to surpass the normal avenues of trial advocacy and move the District Court to appoint a guardian ad litem for his own protection.

CONCLUSIONS

It is clear, from the character of the record and the undisputed facts which certain substantial constitutional rights herein denied, that the courts below have rejected the principles of righteousness and holiness and equity that are contained in the law. The Courts have so far departed from the usual course of judicial proceedings and your petitioner has been made to taste bitter drugs from the cup of affliction and has felt such harsh chilling winds of oppression that calls for a swift and certain exercise of this court's powers of supervision of this case in general, and in the foregoing specifically, being mindful of its Plain Error Rule.

Failure of this Court to review will have the effect of breaching all

of the principles of righteousness, holiness and equity as shown here and will result in irrepairable harm, both to this humble cause and to the integrity and reputation of these proceedings. Wherefore, your petitioner respectfully prays that this Court hear his cries and supplication, and issue a Writ of Certiorari to the Sixth Circuit Court of Appeals.

Respectfully Submitted,

Gary Carson

Gary Carson
Petitioner Pro Se
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Columbus, Ohio 43205
(614) 258-7492

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PROOF OF SERVICE

I, Gary Carson, Petitioner Pro Se, and appellant herein, hereby certify that on the 30th day of September, 1984, I served a copy of the foregoing Petition For A Writ of Certiorari, etc., to the Supreme Court on the above named defendant and appellee by depositing same in a United States Post Office with first class postage prepaid addressed to the attorney of record of said defendant and appellee at his post office address as follows:

David R. Kelleher, Esq.
100 East Broad Street
Columbus, Ohio 43215

Gary Carson
Gary Carson
Petitioner Pro Se

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FILED 2/2

JUL 31 1984

JOHN P. HEHMAN, Clerk

No. 82-3741

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY CARSON,

Plaintiff-Appellant,

v.

WESTERN ELECTRIC CO., INC.,

Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

EXHIBIT "A"

BEFORE: LIVELY, Chief Judge; PECK, Senior Circuit Judge; and NEESE, District Judge.*

PER CURIAM. The plaintiff appeals from judgment for the defendant in this action in which the plaintiff claimed that he had been subjected to racial discrimination in employment practices by the defendant and sought relief pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981. Following a nine-day trial before the court, United States District Judge Robert M. Duncan entered an opinion and order in which he dealt with every aspect of the case. Judge Duncan found that the defendant employer did not subject the plaintiff to disparate treatment either by failing to protect the plaintiff from harassment, by subjecting the plaintiff to disciplinary action or, finally, by terminating the plaintiff's employment.

On appeal the plaintiff argues that the findings of fact on which the district court based its judgment for the defendant are clearly erroneous. The plaintiff also

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*The Honorable C. G. Neese, Senior Judge, U.S. District Court for the Eastern and Middle Districts of Tennessee, sitting by designation.

argues that the findings of fact are not sufficient. Rule 52(a), Federal Rules of Civil Procedure, provides that findings of fact shall not be set aside unless clearly erroneous and that it is sufficient if findings of fact and conclusions of law appear in an opinion or memorandum of decision filed by the court. It is not necessary that the findings of fact be listed numerically and set apart from the text of a memorandum of decision or opinion. Upon consideration of the briefs of the parties and the record on appeal, oral argument having been waived, the court concludes that the findings of fact contained in the opinion of the district court are not clearly erroneous and that the conclusions of law are in accord with controlling legal principles.

Accordingly, the judgment of the district court is affirmed for the reasons set forth in the opinion and order filed by Judge Duncan on October 5, 1982.

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By _____
Deputy Clerk

ISSUED AS MANDATE: August 22, 1984
COSTS: None